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15 UNITED STATES DISTRICT COURT

16 FOR THE NORTHERN DISTRICT OF CALIFORNIA

17 SAN FRANCISCO DIVISION

18 AMERICAN CIVIL LIBERTIES UNION  
19 OF NORTHERN CALIFORNIA; *SAN*  
20 *FRANCISCO BAY GUARDIAN*,

21 Plaintiffs,

22 v.

23 U.S. DEPARTMENT OF JUSTICE,

24 Defendant.

CASE No.: 12-cv-4008-MEJ

**PLAINTIFFS' OPPOSITION AND  
NOTICE OF CROSS-MOTION AND  
CROSS-MOTION FOR PARTIAL  
SUMMARY JUDGMENT;  
MEMORANDUM IN SUPPORT**

Hearing Date: January 9, 2014

Time: 10:00 a.m.

Location: Courtroom B – 15th Floor

Judge: Hon. Maria-Elena James

**NOTICE OF CROSS-MOTION AND CROSS-MOTION FOR PARTIAL SUMMARY****JUDGMENT: TO DEFENDANT AND ITS COUNSEL OF RECORD: PLEASE TAKE**

NOTICE THAT on January 9, 2014 at 10 am, or as soon thereafter as the parties may be heard, Plaintiffs American Civil Liberties Union of Northern California and San Francisco Bay Guardian will bring for hearing a cross-motion for partial summary judgment pursuant to Federal Rule of Civil Procedure 56 in this Freedom of Information Act ("FOIA") action on the ground that Defendant is unlawfully refusing to conduct a search and unlawfully withholding agency documents. The hearing will take place before the Honorable Maria-Elena James, in Courtroom B, 15<sup>th</sup> Floor, 450 Golden Gate Avenue, San Francisco, CA 94102. This motion is based on this notice, the attached memorandum of points and authorities, the accompanying Declaration of Linda Lye and attached exhibits, all pleadings and papers filed in this action, and such oral argument and evidence as may be presented at the hearing on the motion.

Dated: October 25, 2013

Respectfully submitted,

By:                     /s/ Linda Lye                      
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1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 The government's use of location tracking technology is the subject of widespread legal,  
3 legislative, and public debate. Plaintiffs in this FOIA lawsuit seek information that would shed  
4 light on these debates by providing the public with access to information pertaining to the extent  
5 to which the government deploys location tracking technology in its investigations and the legal  
6 prerequisites it satisfies before using intrusive investigative techniques. Under FOIA, an agency  
7 has a statutory duty to conduct a search reasonably calculated to lead to the discovery of  
8 responsive documents. After identifying responsive documents, it must then produce the  
9 documents unless it can meet its burden of showing that the documents fall under one or more  
10 of FOIA's nine statutory exemptions from disclosure. Defendant Department of Justice  
11 ("DOJ") not only asserts that all of these materials are exempt from disclosure, but it takes the  
12 more extreme position that it should not even be required to conduct a search for them.  
13

14 The consequence of DOJ's position is significant: By completely shrouding its location  
15 tracking practices in secrecy, Defendant is depriving the public of information necessary for an  
16 informed public debate and effectively foreclosing legal or legislative challenges to its  
17 surveillance practices.

18 The legal basis for DOJ's position is also lacking. In support of its position that it need  
19 not even process Plaintiffs' FOIA request, it contends that review of the files necessary to  
20 complete the search would be unduly burdensome and that many of the documents are under  
21 seal. But Defendant's own declarations make clear that there are feasible methods for  
22 identifying responsive documents and that the burden on Defendant is not undue, given the  
23 strong public interest in the information. Moreover, although DOJ invokes "sealing orders," it  
24 has not met its burden of proving that the sealing orders at issue actually "*prohibit[]* the agency  
25 from disclosing the records." *Morgan v. Dep't of Justice*, 923 F.2d 195, 197 (D.C. Cir. 1991).  
26 They do not, as evidenced by the language of sealing orders contained in the record. The  
27 sealing orders at issue here are intended to accord DOJ flexibility to keep ongoing  
28 investigations confidential, by limiting access to what would otherwise be publicly accessible

1 court records, not to gag DOJ from ever discussing the matter. The sealing orders thus do not  
2 justify withholding the information from Plaintiffs and they certainly do not justify DOJ's  
3 refusal to complete the search for responsive records.

4 In one regard, however, DOJ is correct. It contends that it need not produce any  
5 documents relating to open investigations. Plaintiffs agree, but the caselaw is also clear that the  
6 public has a right to access court records such as search warrants after the close of an  
7 investigation. *See United States v. Bus. of the Custer Battlefield Museum & Store Located at*  
8 *Interstate 90, Exit 514*, 658 F.3d 1188, 1192 (9<sup>th</sup> Cir. 2011) (search warrant materials subject to  
9 qualified common law right of access after close of investigation). Plaintiffs therefore seek an  
10 order requiring Defendant to search for and produce location tracking orders and applications  
11 where the investigation has been closed, or at a minimum docket numbers pertaining to such  
12 cases so that Plaintiffs can move to unseal them.

13  
14 If Defendant prevails – and is permitted to withhold all information, including docket  
15 numbers, about all location tracking orders sought by the United States' Attorney's Office for  
16 the Northern District of California, even where the investigation is closed – then Defendant will  
17 succeed in ensuring that court records authorizing electronic surveillance will remain  
18 permanently sealed and forever inaccessible to the public. The principles underlying FOIA, the  
19 First Amendment, and the common law right of access to court records do not tolerate the  
20 creation of a permanently secret surveillance docket.

## 21 **II. FACTUAL BACKGROUND**

### 22 **A. The Government Shrouds Its Location Tracking Practices In Secrecy**

23 The federal government has asserted an expansive view of its powers to engage in  
24 location tracking without a warrant based on probable cause. Privacy advocates, by contrast,  
25 argue that location tracking technology enables the government to obtain intimate details of an  
26 individual's life – information about visits to the abortion clinic, psychiatrist, and mosque – and  
27 that warrants are therefore necessary to guard against unreasonable privacy invasions. But  
28 privacy advocates and the public at large face a threshold barrier to even engaging in a



1 meaningful debate over these issues: The government shrouds its location tracking practices in  
2 tremendous secrecy.

3         Resolving a split among the courts of appeals, the Supreme Court last year held in  
4 *United States v. Jones*, \_ U.S. \_\_, 132 S.Ct. 945 (2012), that installing a Global Positioning  
5 Service (GPS) device on an individual's car and using it to track an individual over a 28-day  
6 period constitutes a "search" within the meaning of the Fourth Amendment. But *Jones* by no  
7 means definitely resolved the location tracking debate.

8         The government also uses other forms of location tracking that, while as informationally  
9 intrusive as GPS, do not necessarily involve a physical occupation of private property. Cellular  
10 carriers, for example, have a wealth of information about the location of their subscribers  
11 because cell phone towers collect location information. The applicable legal standard for the  
12 government to obtain cell phone location information from cellular carriers is still percolating in  
13 the courts, which are divided on whether the government must show probable cause. *Compare*  
14 *In re Application for an Order Directing a Provider of Elec. Commc'n Serv. to Disclose*  
15 *Records to Gov't (In re Cell Provider Disclosure)*, 620 F.3d 304 (3d Cir. 2010) (judge may  
16 require government to obtain search warrant for cell site records), *with, e.g., United States v.*  
17 *Skinner*, 690 F.3d 772 (6th Cir. 2012) (no search warrant needed).

18         Courts are also beginning to grapple with the constitutional issues arising out of other  
19 location tracking technologies, such as so-called "stingray" devices, which mimic a cell tower  
20 and thereby trick wireless devices into revealing their location and other information. *See, e.g.,*  
21 *United States v. Rigmaiden*, 2013 WL 1932800, at \* 15 (D. Ariz. May 8, 2013).

22         While the courts are grappling with Fourth Amendment issues, legislators, too, have  
23 waded into the debate. Legislation is pending in Congress that would require law enforcement  
24 to obtain warrants based on probable cause before accessing location information and regulate  
25 the use of location information by private businesses. *See* Geolocation Privacy and  
26 Surveillance Act, H.R. 1312, 113th Cong. (2013-14) and Geolocation Privacy and  
27 Surveillance Act, S.639, 113th Cong. (2013-14).  
28

1 Although information about the government's actual practices when it comes to location  
2 tracking would shed light on these pending legal and legislative debates, the government has  
3 shrouded its location tracking practices in secrecy.<sup>1</sup> Judge Smith of the Southern District of  
4 Texas succinctly described the problem: Government applications for electronic surveillance  
5 orders are typically filed under seal, with a request that the order and underlying documents  
6 remain under seal "until further order of the court." *In re Sealing and Non-Disclosure of*  
7 *Pen/Trap/2703(d) Orders*, 562 F. Supp. 2d 876, 877-78 (S.D. Tex. 2008). "The result has been  
8 a kudzu of sealed manila envelopes overflowing the clerk's office vault" that effectively remain  
9 sealed "for an indefinite period beyond the underlying criminal investigation." *Id.* at 877-78.  
10 After conducting a survey of electronic surveillance orders issued by the Southern District of  
11 Texas over a 13-year period, Judge Smith found that "out of 3886 orders sealed 'until further  
12 order of the court,' 99.7% remain under seal today, many years after issuance. These numbers  
13 confirm, beyond reasonable doubt, that when it comes to shielding electronic surveillance  
14 orders from the public, indefinitely sealed means permanently sealed." *Id.* at 878. Based on the  
15 First Amendment and common law right of access to judicial records, Judge Smith therefore  
16 announced a new protocol, governing the applications for electronic surveillance before him and  
17 future applications, that court sealing orders would remain in effect for only six months, after  
18 which they would automatically expire absent a showing of need by the government for  
19 continued sealing. *Id.* at 895.

21 Even five years after Judge Smith drew attention to the problem, electronic surveillance  
22 orders are routinely filed – and then remain – under seal long after any need for secrecy has  
23 passed. Judge Smith has published a law review article in which he estimates that federal  
24 magistrate judges issued more than 30,000 orders for electronic surveillance under seal in 2006,  
25

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26 <sup>1</sup> In addition to seeking information about the government's practices, Plaintiffs have also sought  
27 information about its policies. But DOJ has taken the position that its policies and procedures  
28 regarding location tracking are exempt from disclosure, a contention that is the subject of the  
cross-motions for summary judgment previously briefed by the parties and heard by the Court on  
September 5, 2013. *See* ECF Nos. 23, 25, 33, 38 (parties cross-motions for summary judgment);  
ECF No. 42 (minute order re: motion hearing).

“more than thirty times the annual number of [Foreign Intelligence Surveillance Act] cases.” Stephen Wm. Smith, *Gagged, Sealed & Delivered: Reforming ECP’s Secret Docket*, 6 Harv. L. & Pol’y Rev. 313, 322 (2012). The same is undoubtedly true in this district: Indeed, the government admits that it does not review and unseal surveillance applications after it closes an investigation – or ever. *See* Kenney Decl. ¶ 9. Only six of the 760 files it identified through an electronic records search are public. *See id.* at ¶ 19.

### **B. The Importance Of Public Access To Location Tracking Orders**

As Judge Smith explained, access to electronic surveillance orders issued by the courts is important for democratic governance. “It may very well be that, given full disclosure of the frequency and extent of these [electronic surveillance] orders, the people and their elected representatives would heartily approve without a second thought. But then again, they might not.” *In re Sealing*, 562 F. Supp. 2d at 886.

While access to court records is fundamental to our open system of government in general, it is particularly important where the government seeks to use new technology to engage in surveillance. This is so because new forms of technology often raise novel statutory and constitutional questions. *Cf., e.g., In re Application Directing Providers to Provide Historical Cell Site Locations Records*, 930 F. Supp. 2d 698, 702 (S.D. Tex. 2012) (understanding of “the technology involved in the requested applications” is necessary to “appreciate the constitutional implications of” the request for authorization to obtain all historical cell site records from four providers for specified cell towers, for example, the impact on “innocent people who are not the target of the criminal investigation” but whose data would be obtained); *In re Digital Analyzer*, 885 F. Supp. 197, 200 (C.D. Cal. 1995) (concluding that “digital analyzer” did not fall within statutory definition of “pen register” or “trap and trace” device). Because the government seeks court authorization – either statutory orders or probable cause warrants – to engage in location tracking in *ex parte* proceedings, magistrates reviewing such applications lack the benefit of the adversarial process in deciding these complex legal issues. This has the potential to create distortions in the development of surveillance law.

1 Public access to these records would increase the likelihood that courts will receive multiple  
2 perspectives on these issues.

3  
4 **C. Sealed Dockets Make It Difficult For The Public To Learn About Or To  
Challenge The Government Surveillance Practices**

5 DOJ notes that of the 760 matters it identified as potentially involving location  
6 information, it found only six files that were not sealed; one of the six files contained responsive  
7 applications and orders that had (separate from this FOIA litigation) been unsealed at the  
8 request of the Deputy Criminal Chief and provided to Plaintiff ACLU of Northern California  
9 (“ACLU-NC”). *See* Kenney Decl. (ECF No. 43-1) at ¶¶ 19, 22 & DOJ Br. at 8-9.

10 The materials previously provided to the ACLU-NC underscore why a sealed  
11 surveillance docket is problematic. These records were not spontaneously unsealed by the U.S.  
12 Attorney’s Office. Rather, the ACLU-NC learned from public pleadings in a *pro se* criminal  
13 case pending in the District of Arizona that the government had used a surveillance tool known  
14 as a stingray or cell-site emulator to track the suspect’s location and that the orders authorizing  
15 use of the stingray had been issued in the Northern District of California but were under seal  
16 and unavailable on this Court’s docket. Seeking to review the orders, the ACLU-NC proceeded  
17 to send four letters to the U.S. Attorney’s Offices in the Northern District of California and the  
18 District of Arizona over the course of 11 months requesting that those offices agree to unseal  
19 the orders. When no substantive response to those requests was forthcoming, the ACLU-NC  
20 filed a noticed-motion to unseal in this District. Only then did the U.S. Attorney’s Office file its  
21 own motion to unseal; it obtained an unsealing order the same day, and then provided the orders  
22 to the ACLU-NC. *See* Third Lye Decl. at ¶¶ 2-5 & Exhs. 1-5.

24 The previously sealed orders and applications revealed that although the government  
25 was purportedly requesting court authorization to use a stingray to track a suspect’s location, it  
26 never explicitly informed the magistrate that it sought to use stingray technology or provided  
27 any information about how the technology works. After reviewing the previously sealed orders,  
28 the ACLU-NC and other civil liberties organizations filed an *amici* brief in the Arizona criminal

1 case in support of the *pro se* defendant's motion to suppress, providing information about  
2 stingray technology (in particular, that stingrays scoop up information from third parties as to  
3 whom there is no probable cause), and arguing that the government's omission of this material  
4 in its warrant application rendered the order constitutionally defective. The arguments in the  
5 *amici* brief could not have been made without access to the underlying location tracking orders.  
6 *See* Third Lye Decl. at ¶¶ 6-8.<sup>2</sup>

7  
8 The record is thus clear. Location tracking orders in this District remain under seal long  
9 after the need for sealing has evaporated. Indeed, as DOJ acknowledges, it has no process for  
10 systematically reviewing "whether the conditions requiring sealing continue." Kenney Decl. at  
11 ¶ 9. Judge Smith's observation about the Southern District of Texas is thus equally apt in this  
12 District: "indefinitely sealed means permanently sealed." *In re Sealing*, 562 F. Supp. 2d at 878.  
13 Members of the public must therefore take affirmative steps to request the unsealing of  
14 particular orders, but of course, will lack the information necessary to request unsealing unless  
15 alerted to a particular order, which occurs only in very unusual circumstances. A FOIA action  
16 such as this is therefore one of the few mechanisms to obtain access to court records which  
17 involve intrusive surveillance techniques.

18 Moreover, these records, if made available to the public, would let the public understand  
19 what the government's surveillance practices actually are. This information is necessary so that  
20 the public can determine whether it supports these practices (or wishes to push for legislative  
21 reform), and whether they suffer from legal infirmities. But by keeping these court records  
22 secret, the government, whether intentionally or not, minimizes legislative and legal challenges  
23 to its location tracking practices.

24  
25  
26  
27 <sup>2</sup> The district court in that case ordered the government to respond to the ACLU-NC's arguments  
28 and, although it ultimately denied the motion to suppress, addressed the ACLU-NC's arguments  
in its opinion. *See Rigmaiden*, ECF No. 981 (attached as Lye Decl., Exh. 6); *Rigmaiden*, 2013  
WL 1932800 at \*14-21.

**D. The DOJ Has Been Able To Search For Records In Response To A Similar FOIA Request**

This is not the only FOIA action that has sought information about the government's use of location tracking technology in specific cases. In *ACLU v. Dep't of Justice*, 655 F.3d 1 (D.C. Cir. 2011), the national office of the ACLU requested, *inter alia*, "case name, docket number, and court of all criminal prosecutions, current or past, of individuals who were tracked using mobile location data, where the government did not first secure a warrant based on probable cause for such data." *Id.* at 4. The information was sought from nine U.S. Attorney's Offices and the Drug Enforcement Agency. *See ACLU v. DOJ*, 08-cv-01157-JR (ECF No. 20) at 2, (attached as Third Lye Decl., Exh. 7).

DOJ's search protocol in that case involved sending an email to each Assistant United States Attorney employed in the Criminal Division of the subject U.S. Attorney's Offices and requesting that they identify responsive case names and docket numbers. *See id.* at 5-6. DOJ identified 255 responsive case names and docket numbers, but withheld them all on the grounds of FOIA's privacy exemptions. *See id.* at 6. The D.C. Circuit held that cases where the defendants were convicted or entered public guilty pleas should be disclosed because the public interest in the information outweighed any privacy interests at stake, and remanded for further factual development to ascertain whether any of the matters involved acquittals or dismissals, where the privacy balance may differ. *See ACLU v. Dep't of Justice*, 655 F.3d at 16-17.

Plaintiffs in this case raised the possibility of using a similar approach, even though any staff departures would likely result in an underinclusive search. *See* Third Lye Decl. at 10. DOJ apparently declined to pursue this possibility.

**III. ARGUMENT**

**A. Legal Framework**

Before turning to DOJ's obligations under FOIA, we first address the public's right to search warrant and analogous materials.

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**1. The Public Has A Right To Search Warrant Materials From Closed Investigations**

The Supreme Court has recognized two qualified rights of access to judicial proceedings and records, one grounded in the common law and the other in the First Amendment. *See Nixon v. Warner Comm., Inc.*, 435 U.S. 589, 597 (1978) (common law right “to inspect and copy public records and documents, including judicial records and documents”); *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8 (1986) (“First Amendment right of access to criminal proceedings” and documents). In the Ninth Circuit, “we start with a strong presumption in favor of access to court records.” *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003); *see also Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (only “two categories of documents” to which the common law right of access does not apply: “grand jury transcripts and warrant materials in the midst of a pre-indictment investigation”).

The Ninth Circuit has expressly held that the common law right of access attaches to search warrant materials once the investigation has concluded. *Custer Battlefield*, 658 F.3d at 1196. While “warrant materials have not historically been accessible to the public during the *early stages* of criminal proceedings,” “[p]ost-investigation ... warrant materials ‘have historically been available to the public.’” *Id.* at 1193 (emphasis in original, citation omitted); *cf. Times Mirror Co. v. United States*, 873 F.2d 1210, 1215 (9th Cir. 1989) (concerns that suspects would destroy evidence, flee the jurisdiction, or coordinate stories before testifying justified denial of access while an investigation was on-going and before any indictments had been returned).

The Southern District of Texas has analogized electronic surveillance orders to search warrants and held, *inter alia*, that the common law right of access precludes such materials from being “sealed indefinitely after the investigation comes to a close.” *See In re Sealing*, 562 F. Supp. 2d at 892, 895 (authorizing sealing only for 180 days after issuance of order, after which orders will be unsealed absent government showing of need for continued secrecy).



As explained above, *see supra* Part II-B&C, there is a particularly strong public interest in disclosure here – to shed light on the government’s location tracking practices so that the public can learn what they are, whether they are intrusive, and whether to press for change before the courts or legislatures. *See Kamakana*, 447 F.3d at 1179 (“public’s understanding of the judicial process” lies at heart of “strong presumption of access to judicial records”); *see also ACLU v. Dep’t of Justice*, 655 F.3d at 12 (finding “significant public interest in disclosure” of information about warrantless cell phone tracking).

The materials at issue here involve applications for court orders authorizing the government to engage in location tracking and are, or are akin to, search warrant materials. Under *Custer Battlefield* and *In re Sealing*, location tracking materials in matters where the investigation has closed are materials that should be available to the public pursuant to the common law right of access to court records.<sup>3</sup>

## 2. Agency Obligations Under FOIA

“The mandate of the FOIA calls for broad disclosure of Government records.” *CIA v. Sims*, 471 U.S. 159, 166 (1985). In responding to a FOIA request, an agency has the duty to “conduct[] a search reasonably calculated to uncover all relevant documents.” *Weisberg v. United States Dep’t of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983); *see also Zemansky v. United States EPA*, 767 F.2d 569, 571 (9th Cir. 1985) (adopting *Weisberg* standard).

The agency “shall make available to the public” the requested records, 5 U.S.C. § 552(a)(3), unless one or more of FOIA’s nine statutory exemptions from disclosure applies. *See* 5 U.S.C. § 552(b). “[G]overnment agencies seeking to withhold documents requested under the FOIA have been required to supply the opposing party and the court with a ‘*Vaughn* index’ identifying each document withheld, the statutory exemption claimed, and a particularized explanation of how disclosure of the particular document would damage the interested protected by the claimed exemption.” *Wiener v. FBI*, 943 F.2d 972, 977 (9th Cir. 1991) (citing *Vaughn v.*

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<sup>3</sup> Plaintiffs contend that the First Amendment also provides a right of access to these materials, but do not address this issue further given the clarity of the contours of the common law right.



1 *Rosen*, 484 F.2d 820 (D.C. Cir. 1973)). The government “has the burden of proving the  
 2 applicability of any FOIA exemption claimed.” *Favish v. Office of Indep. Counsel*, 217 F.3d  
 3 1168, 1175 (9th Cir. 2000) (citation omitted). Because “disclosure, not secrecy, is the dominant  
 4 objective of the Act,” FOIA’s exemptions “must be narrowly construed.” *Department of the Air*  
 5 *Force v. Rose*, 425 U.S. 352, 361 (1976).

6  
 7 **B. DOJ Must Process This Request Because There Are Feasible Search  
 Methods That Do Not Pose An Undue Burden**

8 DOJ contends that it need not process this request because it would be unduly  
 9 burdensome. But DOJ’s own search process and the existence of at least one alternative used  
 10 by DOJ in another similar FOIA suit demonstrate this contention to be without merit.

11 Plaintiffs seek the following discrete category of documents:

12 All requests, subpoenas, and applications for court orders or warrants seeking location  
 13 information since January 1, 2008.

14 Kenney Decl., Exh. A.<sup>4</sup> FOIA requires that an agency respond to “any request for records  
 15 which,” *inter alia*, “reasonably describes such records.” 5 U.S.C. § 552(a)(3)(A)(i). Courts  
 16 have interpreted this to mean that an agency need not undertake searches that would be  
 17 unreasonably burdensome. *See, e.g., American Fed. of Gov. Employees v. Dep’t of Commerce*,  
 18 907 F.2d 203, 209 (D.C. Cir. 1990).

19 There can be no real dispute that Plaintiffs’ request satisfies the literal requirements of  
 20 the statute – by reasonably describing the records sought.<sup>5</sup> But DOJ contends that “the request  
 21

22  
 23 <sup>4</sup> The three other categories of documents sought in Plaintiffs’ FOIA request were addressed in  
 the cross-motions for summary judgment previously briefed by the parties and heard by this  
 Court on September 5, 2013. *See supra* note 1.

24 <sup>5</sup> *Dale v. IRS*, 238 F. Supp. 2d 99 (D.D.C. 2002), cited by DOJ, held a FOIA request for “any and  
 25 all documents” relating to the requester Billy Ray Dale not to reasonably describe the documents  
 26 sought because it did “not specify what [type of] records he seeks, for what years, and located at  
 27 which office of the IRS” and four letters from the IRS requesting further information in order to  
 28 conduct the search yielded no clarifying information from the requester. *Id.* at 103- 04. Here,  
 DOJ has never argued that it needed further information from Plaintiffs to conduct the search.  
 And unlike the FOIA request in *Dale*, Plaintiffs’ FOIA request specified the type of records  
 sought (requests, subpoenas, and applications for court orders or warrants), the years at issue  
 (2008 to present), and the specific office at issue (U.S. Attorney for the Northern District of  
 California).

1 is invalid because there is no method for the USAO-NDCA to identify and locate the specific  
2 records that plaintiffs seek (absent an unduly burdensome hand-search of all files the office has  
3 opened since 2008).” DOJ Br. (ECF No. 43) at 14.

4 It is plainly not the case that DOJ has “no method” to search for responsive records.  
5 Plaintiffs have never requested that DOJ hand search all files the office has opened since 2008  
6 and agree it would be unduly burdensome. But that methodology is not the only option.

7 On the contrary, DOJ in another similar but far broader FOIA matter – where plaintiffs  
8 sought records pertaining to the use of location tracking by not one but *nine* U.S. Attorney’s  
9 Offices *and* the DEA – adopted a search protocol that entailed sending an email to Assistant  
10 United States Attorneys and asking them to identify cases. *See* Third Lye Decl., Exh. 7. While  
11 DOJ is not bound by its decision to use that methodology in another case, it certainly could have,  
12 but simply chose not to, undermining any contention that a hand search of all files opened since  
13 2008 is its only option.

14 In addition, the very search commenced (though not completed) by DOJ demonstrates  
15 that a search reasonably calculated to yield responsive records is entirely feasible and would not  
16 impose an undue burden within the meaning of FOIA. Ms. Kenney’s declaration explains that  
17 DOJ developed a list of search terms in consultation with Plaintiffs and queried its electronic  
18 case management system, known as LIONS. The search returned 1,184 matters. Review by the  
19 Criminal Section Chief eliminated 424 matters as unlikely to have responsive records. The  
20 Chief of the OCDEFT/Narcotics reviewed the list of 760 remaining matters and determined that  
21 386 matters are assigned to open, ongoing investigations. The remaining 374 matters  
22 comprising the 760 have not yet been reviewed by other Section Chiefs to determine whether  
23 they pertain to open, ongoing investigations. *See* Kenney Decl. at ¶¶ 15-17.

24 The Ninth Circuit has held that the qualified First Amendment and common law rights  
25 of access to court records do not extend to search warrant materials during the pendency of a  
26 preindictment investigation. *See Times Mirror*, 873 F.2d at 1215 (though, as discussed above,  
27 the public does have a right to access search warrant materials *after* the close of an investigation,  
28

1 *see Custer Battlefield*, 658 F.3d at 1192; *supra* at Part II-A). Relatedly, FOIA exempts records  
 2 which were “compiled for law enforcement purposes” and which, if disclosed, “could  
 3 reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. § 552(b)(7)(A).  
 4 Based on this FOIA exemption, DOJ contends in the alternative that it “should not be required  
 5 to retrieve files that it can determine involve open investigations.” DOJ Br. at 19 (capitalization  
 6 altered). For the purposes of this motion, Plaintiffs agree.<sup>6</sup>

7  
 8 That being so, what remains is for DOJ to review the 374 matters, exclude those that it  
 9 can determine to pertain to open investigations, and then review the balance. This would  
 10 require *at most* a search of 374 files. But because at least some of the 374 files are likely to  
 11 pertain to open investigations, the universe to be reviewed is likely smaller.

12 As a threshold matter, DOJ cannot argue that a search of at most 374 files creates an  
 13 undue burden. In *Ruotolo v. Dep’t of Justice*, 53 F.3d 4 (2d Cir. 1995), the Second Circuit  
 14 rejected the argument that the search would be unreasonably burdensome where “there were  
 15 only 803 files to be searched. Certainly, the Tax Division should not be relieved from all duty  
 16 to search under the circumstances.” *Id.* at 9.

17 In any event, to establish undue burden, an agency must do more than cite a large  
 18 number of files that would have to be searched; it must also demonstrate that the search is likely  
 19 to be fruitless. In other words, burden must be evaluated in light of the likelihood that the  
 20 search will yield responsive records. In *Public Citizen, Inc. v. Dep’t of Educ.*, 292 F. Supp. 2d 1  
 21 (D.D.C. 2003), the court held that “[w]ithout more specification as to why a search certain to  
 22 turn up responsive documents would be unduly burdensome, defendants’ claim must be  
 23

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24  
 25 <sup>6</sup> The contours of the public right of access to search warrant materials and FOIA’s Exemption  
 26 7A support the argument that DOJ should be permitted to *withhold* materials pertaining to open  
 27 investigations, not that it should be alleviated even of its threshold obligation *to search for*  
 28 responsive records. But in light of the good faith efforts DOJ has expended on conducting the  
 search to date, and the further effort necessary to complete the search, Plaintiffs are willing to  
 agree that under the circumstances, it is reasonable for DOJ to retrieve only those files that it has  
 determined pertain to closed investigations. Plaintiffs thus do not argue that DOJ’s duty to  
 conduct a reasonable search requires it to retrieve files from matters that it has determined  
 pertain to an open investigation.

1 rejected.” *Id.* at 6. The court was not persuaded by the fact that a very large number of files  
2 would have to be searched, and with considerable logistical complication: “defendants merely  
3 claim that searching these 25,000 paper files would be ‘costly and take many hours to complete,’  
4 indicating that the DOE would need to send the files from Texas to California, or employees  
5 from California to Texas, to complete the search.” *Id.* Here, the search would entail a review of  
6 at most 374 files (a far cry from 25,000; no transport of people or files between Texas and  
7 California is required) and there is no dispute that it would yield responsive materials. *See*  
8 Kenney Decl. at ¶¶ 17-22. Under the reasoning of *Public Citizen*, DOJ’s claim of undue burden  
9 must be rejected.  
10

11 DOJ’s cases are entirely distinguishable. *American Fed. of Gov. Employees*, involved a  
12 union’s request for records that would have required the agency “to search virtually every file  
13 contained in over 356 branch and division offices, up to and including the director’s office.”  
14 907 F.2d at 206. Moreover, the D.C. Circuit found the burden especially unreasonable because  
15 the union requested a “vast quantity of material,” rather than documents that were actually “tied  
16 to [the FOIA requester’s] expressed concern with promotion-related materials.” *Id.* at 209.  
17 Similarly, *Irons v. Schuyler*, 465 F.2d 608 (D.C. Cir. 1972), entailed a review of 3.5 million  
18 files accumulated over 100 years. *Id.* at 611-12. In contrast, the search here involves 374 files  
19 in a single office, far short of every file in 356 offices or 3.5 million files. Further, Plaintiffs –  
20 unlike the requesters in *Irons* – do not seek thousands of records unrelated to any discernible  
21 purpose. This FOIA focuses on a category of documents – requests, subpoenas and applications  
22 for court orders or warrants seeking location tracking information since January 1, 2008 – that  
23 directly relates to the purpose of Plaintiffs’ FOIA request – to learn about the government’s  
24 location tracking practices. By contrast, the request in *Irons* would have entailed a search of  
25 millions of papers files that, wholly apart from the burden, would have required the office to  
26 produce “many thousands” of documents to no apparent purpose. *Id.* at 608-11, 614-15.  
27  
28

**C. The Existence Of Sealing Orders Does Not Justify DOJ's Refusal To Process Or Produce Location Tracking Materials Related To Closed Investigations**

Nor does the fact that sealing orders have been entered in connection with some of these matters preclude further processing of this request or production of materials related to closed investigations. In *Morgan*, the D.C. Circuit held that “the mere existence of a court seal is, without more, insufficient to justify nondisclosure under FOIA.” 923 F.2d at 199. To justify withholding information under FOIA based on a sealing order, the agency must prove that the order “*prohibits* [it] from disclosing the records.” *Id.* at 197 (emphasis in original). DOJ has not met its burden of proving that the sealing orders prohibit disclosure and thus justify withholding the information sought, let alone that they justify the agency's refusal even to process and identify on a *Vaughn* index responsive documents.

**1. The Sealing Orders Do Not Prohibit DOJ From Disclosing Information And Documents**

DOJ correctly notes that the Supreme Court held in *GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375 (1980), that an agency had not improperly withheld records under FOIA where it had previously been enjoined from disclosing them. But after *GTE Sylvania*, the D.C. Circuit in *Morgan* confronted the question now before this Court – whether an agency improperly withholds records under FOIA, where the records have previously been ordered sealed. *Morgan* involved an FBI agent's notes about a bank robbery investigation; the notes had been placed under seal by the court in the criminal bank robbery prosecution. *Id.* at 195-96. In a subsequent FOIA suit for the FBI notes, the district court held that the agency could withhold the notes. But the D.C. Circuit reversed.

Applying the *GTE Sylvania* framework, it held that the question was “whether the seal, like an injunction, *prohibits* the agency from disclosing the records. If it does, the FOIA does not compel the agency to release the information. Because the district court in this case relied on the mere existence of the seal, without inquiring into its intended effect, it is not clear that *GTE Sylvania* governs, and a remand is necessary.” *Id.* at 197 (emphasis in original). In evaluating the intended effect of the sealing order, it is necessary to determine if the order actually prohibits the agency from releasing the document. In other words, was the sealing

1 order merely intended to limit public access and thereby keep the document confidential for the  
2 benefit of the filing party, or was it intended to sweep more broadly and act as an affirmative  
3 gag order on the agency? Thus, in *Morgan*, the court noted that the sealing order at issue may  
4 have been “designed only to prohibit Morgan from obtaining the notes from the court record of  
5 his criminal trial,” but may not have been “intended to prohibit the DOJ from releasing the  
6 notes”; under those circumstances, the “FOIA complaint is a valid attempt to obtain the notes”  
7 and “DOJ shows no lack of respect for the judicial process or the [court that entered the sealing  
8 order]” by releasing the notes in the FOIA action. 923 F.2d at 198. In short, a sealing order is  
9 not a protective or gag order: The former simply prohibits public access to the court’s files,  
10 while only the latter prohibits parties from disclosing information or documents. *See id.* at 197  
11 n.2.; *see generally United States v. Brown*, 218 F.3d 415 (5th Cir. 2000) (discussing gag order  
12 prohibiting attorneys, witness, and parties from communicating with media anything about case  
13 that could interfere with fair trial).

14  
15 Agencies seeking to withhold sealed records in a FOIA action therefore “have the  
16 burden of demonstrating that the court issued the seal with the intent to prohibit the [agency]  
17 from disclosing the notes as long as the seal remains in effect. The [agency] may do this by  
18 referring to, *inter alia*: ... the sealing order itself” or “sealing orders of the same court in similar  
19 cases that explain the purpose for the imposition of the seals.” *Morgan*, 923 F.2d at 198.

20 In this case, DOJ asserts that “the general practice at the USAO is ... to apply to seal the  
21 application [for an order seeking location tracking information] (if any), affidavit (if any) and  
22 order.” Kenney Decl. at ¶ 7. While the agency goes on to explain the importance of keeping  
23 information confidential during an on-going investigation, *see id.*, it has not provided any  
24 evidence that the intended scope or effect of the specific sealing orders at issue here was to  
25 impose a gag order on DOJ. In *Senate of Com. of Puerto Rico v. Dep’t of Justice*, 1993 WL  
26 364696 (D.D.C. Aug. 24, 1993), the court rejected DOJ’s argument that it was justified in  
27 withholding “sealed court records” because the agency failed to disclose “the case in which the  
28 documents were sealed, the date or contents of the court order placing the documents under seal,

1 the number of documents affected, or any other information by which this Court could  
 2 determine whether the documents were properly withheld.” *Id.* at \*6 (citing *Morgan*). As in  
 3 *Puerto Rico*, DOJ has talismanically invoked the phrase “sealed court records,” but not  
 4 provided the additional information necessary to carry its burden of proving that any sealing  
 5 orders prohibit disclosure.

6  
 7 On the contrary, the only sealing orders in the record do not prohibit DOJ from ever  
 8 disclosing any information about location tracking orders.

9 DOJ has produced to Plaintiffs various responsive records that were unsealed. *See*  
 10 Second Kornmeier Decl. (ECF No. 43-2) at ¶ 5. One such location tracking order contains the  
 11 following sealing language:

12 Good cause having been shown, IT IS FURTHER ORDERED, pursuant to 18  
 13 U.S.C. §§ 2705(b) and 3123(b), that this Order and the Application be SEALED  
 14 until otherwise ordered by the Court, that the identity of any targets of the  
 15 investigation and the possible violations thereof may be redacted from any copy  
 16 of the Order served on any service provider or other person, and that the Target  
 17 Devices’ Telephone Service Providers and any other Telephone Service Provider  
 18 which provides service to a telephone number that either places telephone calls  
 19 to, or receives telephone calls from, the Target Devices, shall not disclose in any  
 20 manner, directly or indirectly, by any action or inaction, the existence of this  
 21 Order, in full or redacted form, of the pen register or trap and trace devices, or of  
 22 this investigation, to the listed subscribers for the Target Devices, or to any other  
 23 person unless otherwise ordered by this Court.

24 *Id.*, Exh. F at ACLU-PT1-ReRIs-000098. Although the practice in the United States’  
 25 Attorney’s Office is not uniform in all respects (*e.g.*, no uniform practice for opening USAO  
 26 numbers or opening or closing matters), *see* Kenney Decl. at ¶¶ 6, 8, it does appear to be  
 27 somewhat uniform with respect to the practice of obtaining sealing orders (describing “general  
 28 practice”). *See id.* at ¶ 7. Another location tracking order produced to Plaintiffs contains  
 identical sealing language. *See* Second Kornmeier Decl., Exh. G at ACLU-PT1-ReRIs-000120.  
 It is thus reasonable to infer that the language in the sealing order quoted above is similar to the  
 other sealing orders at issue. *See Morgan*, 923 F.2d at 198 (intended effect of sealing order can  
 be established by, *inter alia*, “sealing orders of the same court in similar cases”). But critically,  
 this language does not prohibit DOJ from disclosing any information about location tracking



orders. This is so for two separate and independent reasons.

**(a) The Sealing Orders Only Seal Documents But Do Not Seal Docket Information**

It is important to note the limited scope of what has been sealed. The plain language of the order seals particular *documents*, but not entire *dockets*. See Second Kornmeier Decl. at ACLU-PT1-ReRIs-000098 (sealing “this Order and the Application”). Thus, contrary to DOJ’s assertion, the Court has not sealed any *dockets*, and nothing in the order “precludes the disclosure of information relating to those dockets.” DOJ Br. at 17. Thus, DOJ is not prohibited from releasing docket information of location tracking applications and orders (*i.e.*, information about cases in which such orders have been requested). Indeed, DOJ has previously been ordered to provide case information so that the court could evaluate the agency’s claim that “documents allegedly under seal were properly withheld by the Defendants.” *Puerto Rico*, 1993 WL 364696 at \*7 (directing DOJ to “inform the Court as to how many documents are under court seal, when they were placed under seal *and in what case*, and any and all further information necessary for the Court to” evaluate DOJ’s justification for withholding the documents) (emphasis added).

**(b) The Sealing Orders Limit Public Access to Court Records But Impose No Gag Order On DOJ**

Of equal importance, the plain language of the sealing order merely seals the location tracking order and application, but does not prohibit DOJ from disclosing these documents. In other words, the sealing order limits public access to documents on the court’s otherwise public docket; it does not impose a gag order on DOJ.

As discussed above, *Morgan* requires an inquiry into whether a sealing order “prohibits the agency from disclosing the records.” 923 F.2d at 197. An order that is “designed only to prohibit [a party or the public] from obtaining [the records] from the court” is not a prohibition on the agency’s disclosure of those same records. *Id.* at 198. Similarly, in *Armstrong v. Exec. Ofc. of Pres.*, 830 F. Supp. 19 (D.D.C. 1993), FOIA requesters sought information that had been released to Caspar Weinberger in his criminal prosecution pursuant to a protective order. The



1 court held that the protective order did not justify withholding the information in the FOIA  
2 action. *Id.* at 22-23. The protective order had been issued pursuant to the Classified  
3 Information Procedures Act, the purpose of which is “to harmonize a criminal defendant’s right  
4 to exculpatory material with the Government’s right to protect classified information.” *Id.* at 22.  
5 Thus, the protective order in that case protected the government’s interest in keeping  
6 information confidential, but did not restrict the government’s future ability to release the  
7 information. *Id.* at 23.

8  
9 The record evidence here supports the conclusion that the applicable sealing orders do  
10 not prohibit DOJ from disclosing location tracking orders. Instead, they limit public access to  
11 what would otherwise be publicly accessible court records, in order to allow DOJ to protect the  
12 integrity of on-going investigations.

13 First, while the sample sealing in the record does contain an express prohibition on  
14 disclosure, that prohibition applies only to telephone service providers, and not DOJ. The  
15 sealing order expressly prohibits “the Target Devices’ Telephone Service Providers and  
16 [certain] other Telephone Service Provider[s]” from “disclos[ing] in any manner, directly or  
17 indirectly, by any action or inaction, the existence of this Order.” Second Kornmeier Decl. at  
18 ACLU-PT1-ReRIs-000098. However, it contains no prohibition against the government doing  
19 the same. Had the Court intended to prohibit the government from doing something it expressly  
20 prohibited Telephone Service Providers from doing, the Court knew how to say so.

21 Second, other language gives the government discretion as to the parties with whom it  
22 may share the location tracking order and application. The sample sealing order states that “the  
23 identity of any targets of the investigation and the possible violations thereof *may* be redacted  
24 from any copy of the Order served on any service provider *or other person.*” *Id.* (emphasis  
25 added). In other words, DOJ has discretion, but is not required, to redact portions of the Order,  
26 and can share the order with the “service provider” or indeed with “any other person.” *Id.* If  
27 the sealing order were intended to act as a gag on DOJ, it would not leave so much flexibility.  
28 Instead, it would prohibit DOJ from disclosing the order or at a minimum state that DOJ is only

1 authorized to serve the order on the telephone service provider and such other parties as are  
2 necessary to effectuate the order.

3 Finally, the sealing order must be construed in light of the purpose for which it was  
4 sought. *See Morgan*, 923 F.2d at 198 (factors relevant to question whether seal issued “with the  
5 intent to prohibit [agency] from disclosing” records include “the purpose for the imposition of  
6 the seals”). DOJ’s stated purpose in seeking to “[s]eal[] applications and orders” is to “avoid[]  
7 jeopardizing the investigation by its premature disclosure.” Kenney Decl. at ¶ 7. By sealing  
8 these documents, DOJ can limit third-party access to what would otherwise be public court  
9 records. If these records were publicly accessible through the court, either the target of a  
10 pending investigation or her associates could learn of these location tracking orders. *Id.* In  
11 other words, the sealing order is intended to benefit DOJ so that it can keep an on-going  
12 investigation confidential, not to silence DOJ so that it is forever prohibited from disclosing any  
13 information about investigations that have long since closed and that it no longer has a need to  
14 keep confidential. “A limitation on the method of access to certain records is not synonymous  
15 with a prohibition on their future releases.” *Armstrong*, 830 F. Supp. at 23.

17 In sum, the sealing orders do not prohibit DOJ from disclosing either docket information  
18 or the underlying location tracking orders and applications. As a result, they cannot serve as a  
19 justification for withholding documents under FOIA. And they certainly cannot serve as a  
20 justification for DOJ’s refusal to engage in any further processing of Plaintiffs’ FOIA request.

## 21 **2. The Pen Register Statute Does Not Justify Withholding The** 22 **Materials**

23 DOJ makes the related argument that the pen register statute, 18 U.S.C. § 3123(d), and  
24 FOIA’s Exemption 3 justify the withholding. They do not, for reasons similar to DOJ’s sealing  
25 order argument.

26 Exemption 3 in its current form was amended by Congress with the express goal of  
27 legislatively overruling caselaw that “had given an expansive reading to the version of  
28 Exemption 3 [previously] in force.” *Church of Scientology of California v. U.S. Postal Service*,

633 F.2d 1327, 1329 (9th Cir. 1980) (citation omitted). To withhold materials pursuant to this exemption, the government must show two things: “that the statute on which it relies qualifies as an exempting statute and that the material being withheld falls within the exempting statute’s coverage.” *Cal-Almond, Inc. v. Dep’t. of Agriculture*, 960 F.2d 105, 108 (9th Cir. 1992).

DOJ contends that the pen register statute serves as an exempting statute. *See* DOJ Br. at 17. Even if it qualified as such, which it does not, the materials requested by Plaintiffs do not fall within the statute’s coverage. The pen register statute on which DOJ relies provides:

An order authorizing or approving the installation and use of a pen register or a trap and trace device shall direct that—

- (1) the *order* be sealed until otherwise ordered by the court; and
- (2) the person owning or leasing the line or other facility to which the pen register or a trap and trace device is attached or applied, or who is obligated by the order to provide assistance to the applicant, not disclose the existence of the pen register or trap and trace device or the existence of the investigation to the listed subscriber, or to any other person, unless or until otherwise ordered by the court.

18 U.S.C. § 3123(d) (emphasis added). While the sealing orders discussed above seal both orders and applications, the underlying pen register statute has a narrower scope and provides for sealing only of the pen register *order*, not of the pen register *application*.

Notably, Plaintiffs seek “requests, subpoenas, and applications for court orders or warrants seeking location information.” *See* FOIA Request at 3 (attached as Kenney Decl., Exh. A). Because the records sought by Plaintiffs (*applications* for pen register orders) fall outside the scope of 18 U.S.C. § 3123(d) (which covers only *orders*), the statute provides no basis for withholding the requested materials. Moreover, to the extent DOJ has obtained location tracking information through requests, subpoenas, applications for court orders pursuant to some statute other than 18 U.S.C. § 3123(d), or applications for warrants,<sup>7</sup> all of these responsive materials are also outside the scope of the pen register statute. *See Carlson v. United States Postal Serv.*, 504 F.3d 1123, 1130 (9th Cir. 2007) (rejecting agency’s Exemption 3 claim

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<sup>7</sup> Some of the responsive location tracking materials provided to Plaintiffs include warrants. *See* Second Kornmeier Decl., Exh. H at ACLU-PT1-ReRIs-000134-137 (warrant and application for warrant pursuant to Fed. R. Crim. P. 41).

1 where information about post offices was not “within the scope” of exempting statute); *Cal-*  
2 *Almond*, 960 F.2d at 108 (rejecting agency’s Exemption 3 claim where list of almond growers  
3 did not fall within purported exempting statute’s coverage). In addition, Section 3123(d)  
4 nowhere requires the sealing of entire dockets, and thus in no way limits DOJ’s ability to  
5 disclose docket information of matters involving location.

6  
7 Moreover, the pen register statute does not constitute an exempting statute under  
8 Exemption 3. Congress “did not want the exemption to be triggered by every statute that in any  
9 way gives administrators discretion to withhold documents from the public.” *Church of*  
10 *Scientology*, 633 F.2d at 1329 (citation omitted). “[A] court must analyze,” among other things,  
11 “the amount of discretion left to the agency” to disclose the records. *Id.* at 1330. Only those  
12 statutes that limit the agency’s discretion to disclose documents qualify as exempting statutes.  
13 *Id.* at 1329-30. In this regard, the inquiry is analogous to that with respect to sealing orders:  
14 Does the statute limit DOJ’s discretion to disclose the materials sought here? Like the sealing  
15 orders, the pen register statute does not impose a gag order on DOJ. Instead, it gives DOJ the  
16 flexibility it needs to keep an investigation confidential by expressly imposing a gag order on  
17 the telephone service provider (but not DOJ) and preventing the public from obtaining the order  
18 through the court’s public docket.

19 DOJ cites *Manna v. Dep’t of Justice*, 815 F. Supp. 798 (D.N.J. 1993), which held that  
20 two sealed pen register applications and two pen register orders fell under Exemption 3 and  
21 Section 3123(d). *Id.* at 812. Assuming the portion of the decision relating to pen register orders  
22 is correct, it is nonetheless distinguishable because Plaintiffs seek pen register applications.  
23 *Manna* offered no reasoning in support of the portion of its holding relating to applications, and  
24 Plaintiffs respectfully submit that this portion of the opinion was erroneously decided. As  
25 discussed above, the plain language of Section 3123(d) encompasses only orders and does not  
26 extend to applications. *Riley v. FBI*, 2002 U.S. Dist. LEXIS 2632 (D.D.C. Feb. 11, 2002), is  
27 unpersuasive because it merely cites *Manna*, but offers no reasoning. And *Jennings v. FBI*, No.  
28 03-cv-01651-JDB (D.D.C. May 6, 2004) (attached as ECF No. 43-3), rests on the erroneous

premise that Section 3123(d) broadly “prohibits disclosure of the existence of the pen register or trap and trace device.” *See* Slip Op. at 11. On the contrary, the statute only prohibits “the person owning or leasing the line or facility” or “who is obligated ... to provide assistance to the applicant” from disclosing “the existence of the pen register or trap and trace device.” 18 U.S.C. § 3123(d). Under the principle of *expressio unius*, neither DOJ nor any other entity is prohibited from making such a disclosure.

### 3. DOJ Must Identify And Produce Responsive Records Or Information

For the foregoing reasons, DOJ cannot rely on the existence of sealing orders to justify its refusal to complete the search or to produce responsive documents. As noted above, Plaintiffs agree that the relevant universe of documents is location tracking materials where the investigation is closed.

If the court concludes that neither the sealing orders nor Section 3123(d) prohibit DOJ from producing the underlying documents, then it should order DOJ to complete the search and produce the materials.

If the court, however, concludes that DOJ may withhold the *documents*, it should still conclude that neither the sealing orders nor Section 3123(d) prohibits DOJ from revealing the *docket numbers* associated with location tracking applications in closed investigations. In other words, even if DOJ may permissibly withhold the documents, it still has a duty under FOIA to identify them with docket numbers on a *Vaughn* index. Plaintiffs can then separately move to unseal the identified matters.

### D. DOJ’s Redactions Of Unsealed Court Records

DOJ has provided to Plaintiffs location tracking applications and orders that it determined not to be under seal. *See* Second Kornmeier Decl. at ¶ 5. DOJ has redacted information from these unsealed court records pursuant to FOIA Exemption 7(C), which exempts law enforcement records that, if disclosed, could reasonably be expected to constitute an unwarranted invasion of privacy. While Plaintiffs do not contest for the purpose of this

1 motion the 7(C) redactions from the materials it has produced to date, Plaintiffs do not agree  
2 that docket information, dates of filings, and the identity of judges who have entered orders can  
3 be withheld pursuant to Exemption 7(C) from the remaining materials that DOJ has not yet  
4 reviewed and produced.

5 **IV. CONCLUSION**

6 For the foregoing reasons, the Court should deny DOJ's motion for partial summary  
7 judgment and grant Plaintiffs' cross-motion. The Court should order DOJ to: (1) complete the  
8 search as described in Part III-B, and (2) produce location tracking materials in cases where the  
9 investigation is closed, or in the alternative produce a *Vaughn* index identifying docket numbers  
10 associated with such matters.  
11

12 Dated: October 25, 2013

Respectfully submitted,

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